

July 13, 2006

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex W)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
Attn: Mr. Donald S. Clark, Secretary

Re: Business Opportunity Rule R511993

Dear Mr. Clark:

The Newspaper Association of America ("NAA") is pleased to submit these comments in response to the Federal Trade Commission's ("FTC") Notice of Proposed Rulemaking that was published in the Federal Register on April 12, 2006 with respect to the above-captioned proposed trade regulation rule ("Proposed Rule").

Succinctly stated, NAA believes that the scope of the Proposed Rule must be reduced to exclude relationships in which (i) the only "required" payments made by buyers to sellers are for commercially reasonable quantities of inventory at bona fide wholesale prices; and (ii) the only other payments made by buyers to sellers are for goods and services that buyers voluntarily choose to make and for which alternative suppliers are available (collectively, "Payment Exclusion"). The FTC will, of course, recognize NAA's proposed Payment Exclusion because this exclusion currently exists under the FTC's Franchise and Business Opportunity Trade Regulation Rule ("Franchise Rule"), and has permitted product distributors, such as NAA's members, who limit payment obligations from their distributors to those constituting a Payment Exclusion, to avoid the burden and expense of complying with the Franchise Rule. During the 26 years since the Franchise Rule has been in effect, the FTC's judgment that relationships of this nature need not be regulated by a pre-sale disclosure obligation has proven to be correct. NAA is not aware of any evidence to suggest that the actions of NAA members or other product distributors are or threaten to become a consumer protection problem requiring pre-sale disclosure regulation, nor did the FTC mention in its Notice of Proposed Rulemaking that any such consumer protection problems exist with

respect to this type of payment model. Instead, the FTC cited only the problems created by pyramid schemes -- an aberrant business model which bears no relationship whatsoever to NAA members, the newspaper industry, or the overwhelming number of other product distributors. For this reason, we strongly urge the FTC to include in the Proposed Rule the Payment Exclusion now present in the Franchise Rule; in addition, while we support pre-sale regulation of pyramid schemes, we are confident that the FTC can craft the definitional scope of the Proposed Rule to include pyramid schemes without, simultaneously, including NAA members and other product distributors for whom pre-sale regulation is both unnecessary and burdensome.

NAA is a trade association whose members publish approximately 2,000 daily and/or weekly newspapers that comprise nearly 90 percent of the daily circulation of newspapers in the United States. The newspaper industry employs more than 350,000 U.S. workers, and also contracts with independent carriers who are responsible for delivering approximately 95 percent of these newspapers. Since NAA members represent a large and diverse group, each having a carrier relationship whose terms are dictated by local conditions such as market area, demographics, type of publication, etc., there is no one uniform newspaper-carrier relationship model. Therefore, the following discussion of the newspaper-carrier relationship is representative of most, but not all, members' businesses.

The preponderant newspaper relationship is a buy-sell arrangement, which is utilized by more than 60 percent of carriers. This involves a newspaper selling its publication to carriers at bona fide wholesale prices, for resale by them to customers. The carriers are supplied with an initial customer list. While such lists will change over time as customers come and go, the core of the lists will usually not fluctuate on a short term basis to any significant extent.

Newspapers and carriers make available to home delivery customers the option of paying either the carriers or the newspapers; approximately 97 percent of the home delivery customers (including all types of carriers) elect to pay the newspapers, with the newspapers performing the collection and accounting functions on behalf of at least 80 percent of the carriers using the buy-sell format. Typically newspapers weekly or monthly account reconciliations with carriers include credits for any applicable promotional allowances or incentives (commissions for new orders, complaint free service rewards, etc.) and debits for charges where the carrier misses delivery or the newspaper is damaged or incomplete and the newspaper makes the redelivery rather than the carrier. In a large percentage of carrier situations, the weekly or monthly reconciliation results in the newspaper issuing a check to the carrier rather than the carrier paying the newspaper. Carriers collect directly from the remaining small percentage of their customers who choose not to pay the newspaper directly.

Typically, carriers may terminate their relationship with a newspaper on short notice without financial penalty.

Some carriers re-sell to retail accounts, which in turn sell to the public or operate newspaper vending machines. Papers sold in this fashion are typically referred to as "single copy." Typically unsold single copy papers may be returned. Many of the chain retailers, who have locations that deal with different carriers, insist upon having one bill and making one payment. Here, like the option for home delivery customers, newspapers aggregate the

billings and receive a single periodic payment from a chain retailer, crediting each carrier with his/her share of the proceeds. Just as is the case with home delivery carriers, many single copy carriers receive a check from the newspaper, rather than having to pay the newspaper.

We are unaware of any NAA member who charges an initial fee to a carrier for the right to distribute the member's newspaper. In addition to purchasing newspapers, carriers can and sometimes do make other incidental payments to the newspapers for items such as bags, string, rental of a facility at the newspaper pick-up point to conveniently bag papers, holiday cards, insurance and/or surety policies, apparel, etc. but, in each instance, the carrier's payment is voluntary and alternative suppliers are readily available.

NAA believes that normal market forces present in relationships where Excluded Payments are the only payments made by a buyer to a seller, such as NAA members' practices, eliminate the need for additional laws that will both interfere with the market and add compliance costs and burdens. The paramount economic feature of these types of relationships is that it is crucial to the "seller" that the carrier (distributor) be successful in selling the inventory that it purchases since the success of the seller's business is not dependent on the small revenue that it receives from the wholesale transactions, but rather upon the readership that is generated. This readership supports newspapers' ability to generate the advertising revenue that enables each newspaper to create the editorial content that informs the community and attracts readership. Thus, these types of relationships incentivize -- indeed, literally require -- sellers to contract with qualified carriers and thereafter provide a business-to-business platform, which increases the chances that the sellers and carriers have a mutually successful business relationship. Although the majority of carriers are independent contractors with their own business agendas, when they are successful the newspapers are successful. In addition, NAA members' relationships involve only modest risk to carriers, relating primarily to circumstances where the carrier fails to fulfill its obligation to satisfactorily deliver newspapers to its customers. NAA members have been using the buy-sell distribution model for more than a century with little or no evidence of consumer protection problems.

Some specifics about how market forces work efficiently and properly to self-regulate the relationship between NAA members and its carriers are:

1. The only "required payment" made by carriers to NAA members is for the purchase of newspapers at bona fide wholesale prices and commercially reasonable quantities, for "resale" to the public. The "public" consists of either pre-sold home delivery customers or other venues where the carrier has the right to return unsold copies to the publisher for credit. Other ongoing payments that a carrier chooses to make to the publisher are at the carrier's discretion and are for products and services where an alternative supplier exists. Carriers do not make any initial fee or other required payment to a NAA member for the right to become a distributor.

2. Circulation is the lifeblood of the newspaper industry. NAA members' (and non-members') principal revenue source is advertising which, in turn, is based on circulation.¹ Newspapers must have readership, and a poorly performing carrier will lose readers, which, in turn, will lower circulation and, thus, reduce advertising revenues. Therefore, a carrier's success ultimately redounds to the benefit of the newspaper.

3. Carriers' risk of losses resulting from having unsold inventory or not getting paid by customers is very low. NAA members offer carriers an existing route of pre-established customers. Because the carriers' home delivery customers represent a fairly stable group, customer payment habits are very reliable. As previously mentioned, carriers know precisely how much inventory is needed for home delivery customers and, in the overwhelming majority of situations, carriers receive credit for a reasonable amount of returns for single copy customers. Other business costs or risks also can be low, since carriers are frequently able to use their personal vehicles to deliver newspapers, and for those carriers who purchase a larger vehicle, a ready market currently exists to both buy and sell vehicles, so that any vehicle investment is liquid.

4. Carriers have many pre-sale opportunities to learn about the proposed relationship with the member. In most cases, the prospective carrier has the opportunity to review the proposed delivery route prior to becoming a carrier, and thus knows the number of customers, the number of newspapers, the number of miles covered by the route, etc. By witnessing the actual operations and by pre-screening the proposed route, the prospective carrier has ample opportunity to obtain the information needed to make an informed decision. And if the carrier, after contracting to deliver a route, should decide to discontinue its business operations, most NAA members' distribution arrangements are cancelable by the carrier, with or without cause, by providing advance notice -- usually 30 days.

5. In the event that a dispute arises between a NAA member and a carrier, the carrier has a meaningful adjudicatory and redress process available to it. Unlike many of the business opportunity sellers who are the real focus of the Proposed Rule (as well as the "business opportunity" definition of the current Franchise Rule), NAA members are substantial business entities, with stable management, bona fide assets, and the financial resources to pay any judgment that may be obtained against them.

6. If NAA members were covered by the Proposed Rule, they would incur significant compliance burdens. Because NAA members provide an existing route, and no two routes are identical, the Proposed Rule would require NAA members to prepare a customized disclosure document for each prospective carrier in order to reflect the route's revenues. Moreover, given the number of newspapers and carriers in our industry and the ease with which carriers can enter and exit the relationship, we estimate that the industry would need to annually

¹ The Audit Bureau of Circulations is an entity which conducts rigorous annual audits of its members' circulations and prepares detailed audit reports that are available to publisher and advertiser members of the Bureau. Many NAA members are members of the Bureau. While papers sold for home delivery are not subject to return, based upon Audit Bureau of Circulations rules, the number of newspapers sold to distributors for home delivery can be carefully matched by carriers to the distributors' subscriber lists.

provide 250,000 disclosure documents -- a mammoth administrative and recordkeeping burden.

The focus of our comment is, of course, on our members' businesses and how the Proposed Rule is unnecessary (as demonstrated by the lack of any evidence of consumer protection problems and the availability of pre-sale information for prospective carriers) and unduly burdensome. Moreover, we suspect that a significant number of other product distribution arrangements also could make the same convincing argument based upon the facts in their own industries. The common theme that unifies NAA members and the large number of other product distributors is the presence of the Excluded Payments as the only revenue source from its distributors. As previously discussed, the market forces attendant to this business model, i.e., the "seller" is successful only if the "buyer" is successful, have proven their efficacy over many years. These types of relationships must continue to be excluded from regulation under the Proposed Rule, just as they have been excluded from the Franchise Rule.

Respectfully submitted,

John Sturm
President & CEO